FOR ARGUMENT

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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal from the Supreme Court of California

Brief of *Amicus Curiae,* City of San Jose, California and Other Joining Cities and Counties of California In Support of Appellee

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STATEMENT OF THE CASE

Amicus curiae City of San Jose adopts in full the statement of the case made by appellee City of Tiburon (hereinafter "Tiburon").

INTEREST OF AMICUS CURIAE CITY OF SAN JOSE

This appeal will shape the character and conduct of land-use litigation for the future. *Amicus curiae* City of San Jose (hereinafter "City") and other joining cities have a present, and predictably continuing, interest in such litiga-

tion, typically as the party defending a regulation against the landowner's claim of an unconstitutional taking. But no wanton disregard of private property rights entangles City in litigation repeatedly. Rather, it is the sad fact that, ever since God rested on the seventh day of Creation, no mortal governor has found the perfect wisdom and skill with which to harmonize the conflicting demands in land-use planning and regulation.

City's interest in this appeal is typical, in varying degrees, of concerns shared by other California cities and counties joining in this brief. All face similar fiscal problems; all follow the same procedures in land-use planning, zoning, conservation, and environmental quality; and all have experienced at least the pressure of inverse condemnation litigation if not its actual grip upon their legislative bodies and treasuries.

The physical conditions of City present a first set of land-use planning demands. City includes both flood plains and steep hillsides; each poses special risks for development, and each is vulnerable in different ways to the California calamity named earthquake. In addition, City covers some 156 square miles of territory. The magnitude of this area guarantees topographical diversity. It also creates problems of transportation and communication. The City Council must agonize yearly, in its budget hearings, over the delivery of municipal services throughout that extensive area.

Even the air resists circulation. Lines of hills to the east, south and west of City block and hold pollutants as they rise from the valleys, and a familiar reaction with strong sunlight and moisture generates that California ether called smog. Almost every morning City wears, with dubious honor, a golden-brown crown of smog, to be removed only by grace of an afternoon wind.

People, with their personal and their commercial needs, present the second set of demands. People desire shelter, preferably in the form of single-family houses affording privacy and appearing gracious. In order to pay the high cost of such housing in California, people must work. Getting to work in City usually means driving an automobile over congested freeways and secondary roads for at least twenty minutes, often much longer. For their part, employers may have in mind criteria other than those of convenience to employees when deciding where to locate their businesses. Industry considers such things as transportation, accessibility and visibility, local taxation, location of suppliers and customers, and cost of land, just to mention the major items. Perhaps some municipality has struck perfection in the location of its housing and industry and transportation corridors. Unfortunately, City has not yet achieved such an urban miracle.

A third set of conflicting demands comes from the California Legislature itself. Common sense tells us that everyone needs to breathe air and drink water. Almost everyone, including the most active entrepreneur in his private moments, prefers beauty to ugliness, and prefers natural beauty at that. Long ago Will Rogers told us that land is something they aren't making any more of. Having learned this common wisdom, the California Legislature during the past two decades has enacted a broad range of land use planning, environmental quality control, and specific conservation laws.

City must obey those laws in making land-use decisions. But those laws do not in themselves resolve the conflicting demands made upon City. Instead, the statutes exalt the resolution of those demands into a legal duty. The effect is one of defining and sharpening the choices faced by the

City Council, rather than offering deliverance from the irreconcilable forces at play.

Only god-like wisdom would give the correct answer to every land-use question. City council members, being fallible by nature and nonprofessional by circumstance, rely upon their legislative discretion. The California courts have traditionally assured local legislators that they do indeed possess such discretion. *E.g., Ensign Bickford Realty Corp. v. City Council,* 68 Cal.App.3d 467, 137 Cal. Rptr. 304 (1977); *Toso v. City of Santa Barbara,* 101 Cal. App.3d 934, 943, ... Cal. Rptr. ..... (1980). City's concern with this appeal relates to the consequence of exceeding a legitimate exercise of that discretion.

The significance of the California Supreme Court's decision here consists in its explicitly addressing the pragmatic problems with which cities throughout California must contend in this new era of diminishing natural resources, dwindling fiscal resources, and changing demographic patterns.

City also has a specific interest in this appeal as a litigant. That interest typifies those of other cities joining in this brief. Two inverse condemnation cases against City remain pending in the federal Northern District Court of California. The first of these, *Barbaccia v. County of Santa Clara, et al.,* Civil No. 76-1182-SW, arose from City's refusal to annex and prezone for high-density residential use some 100 acres of land already developed as a golf course. The surrounding area is dedicated to single-family residential development on small lots. City, reflecting in part the wishes of neighborhood residents, decided that the preservation of recreational and/or open-space uses on the land best served the needs of its citizens during the period of its general plan. (The plan extends through 1990, subject to earlier amendment at annual public hearings.)

The landowners charged that, in designating the land for private recreational use in its general plan, City had effectively denied all economic use of the land and taken it for public purposes. In defense, City pointed out that the general-plan designation merely confirmed an existing use chosen by the landowner and, in any case, the golf course produced a reasonable return on investment. On August 31, 1979 the trial judge orally granted City's motion for summary judgment. Since then the trial court has not proceeded to adopt findings of fact and conclusions of law, nor has it entered final judgment against the landowner. The complaint seeks some $5,000,000 in damages. But those estimated damages relate, of course, to an alleged taking in July of 1975.

The second case pending in the Northern District of California, *Oceanic California, Inc. v. City of San Jose,* Civil No. 78-2622-AJZ, pits City against a subsidiary of a "Fortune 500" corporation. (Oceanic California, Inc. is the California land/development subsidiary of Castle & Cooke, Inc. whose annual revenues exceed those of City by about a factor of four.) This landowner purchased some 10,000 acres of unimproved land, part of which now lies in the nearby city of Morgan Hill, during the early 1960's.

During the late 1950's and early 1960's City raced against neighboring cities in a land-annexation contest. In the southern sector, City proved especially successful (or, in hindsight, unfortunate). City managed to incorporate territory lying over ten miles from its urban center through a series of so-called "strip annexations" along the major highway running south. No urban services existed in that territory.

A good deal of plaintiff's land was incorporated during this period. In terms of its physical character, the land is mainly hills, with some level areas, but vulnerable to geo-

logic instability and soil erosion. Its main historical use was for grazing cattle on wild vegetation. Vacant and relatively barren aptly describe the bulk of the land.

In 1970 City's land-use policies changed dramatically. Faced with sudden resistance from its citizens against increased taxation, brought home by the then-unprecedented defeat of bond-issuance proposals, the City Council looked with new concern upon the great stretches of territory it had undertaken to govern and to service. The Council then adopted its "urban development policy" as part of the general plan, in order to control the urban expansion. Under this policy, those vacant lands within the urban core, where most municipal services already existed without further capital improvements, would first be dedicated to new residential and industrial uses. In California, the term of art for this strategy is "in-filling." By requiring development first of unimproved central parcels, "in-filling" prevents development from occurring most rapidly at the periphery of City. This policy likewise assures greater efficiency in providing services within the urban core.

This new policy ran counter to plaintiff's original plans to construct virtually a new city, having a population of over 100,000 persons, about fifteen miles south of City's center. The landowner had never gone ahead with that grandiose concept during the 1960's. The reasons for its unhurried approach remain unexplained, and are likely to be disputed. By the middle of the 1970's, plaintiff could not demonstrate that its project was consistent with City's current land-use policies.

In 1978 City finally denied the only development application which plaintiff had ever pursued to a conclusion before the City Council. The landowner's response, long threatened by its attorney at Council hearings, took the form of

an action for inverse condemnation seeking damages of $30,000,000. As additional relief, the complaint sought a declaration of invalidity on City's general plan as applied to the property. Moreover, plaintiff asked the court to assert continuing jurisdiction subsequent to invalidation in order to assure that City afforded it an economically viable project under any new regulations enacted according to the court's decision. City filed a motion to dismiss under FRCP 12(b)(6). After oral argument on October 18, 1979, the district court took the motion under submission. The district court has not yet ruled on the motion.

City is concerned that the decision on this appeal will affect the rulings in both of those pending cases. Adverse rulings could expose City to judgments totalling $35,000,000 or more in monetary damages. This sum is more than ten percent of City's present annual budget. That should suffice to demonstrate tangibly City's interest in this appeal. But City's interest is not simply pecuniary.

Appellants and their *amici* would have this Court believe that California cities simply do not want to pay money for their violations of the Fifth Amendment, and that the California Supreme Court has relieved them of that burden at the expense of the individual landowner. That view is somewhat crass. It depicts local government as institutionalized thievery. It treats land-use regulation as the means of tyranny, rather than as the practical expression of the public will in pursuit of the public weal.

City's policy of controlled urban growth has survived at least three mayoral elections, five councilmanic elections, and, most importantly, a thorough review by a citizen's committee while preparing its current general plan in 1975. During the past few years, as a result of property-tax reform measures passed by the voters of California, the

financial necessity for such a policy has taken on very imposing proportions. City simply lacks the tax revenues needed to deliver and maintain municipal services in its most remote areas. Indeed, the task is not easy even within the core of City.

No doubt, some landowners have been frustrated in their development plans. But frustration, not to mention plain loss, remains a permanent feature of the world of investment. It occurs to investors in the stock market; investors in real estate enjoy no exemption. Perhaps the most ready means of expressing such frustration is to litigate against City; for litigation promises to translate great, but lost, expectations into constitutional wrongs compensable with money. The threat of such litigation—or even attorneys' fees alone—can cause City to hesitate in carrying out its land-use policy. The fact of such litigation means that the citizens as a group must pay an individual landowner for a theoretical loss of potential value caused, in the final analysis, by changing economic and environmental conditions not controlled by City or its citizens.

The decision of the California Supreme Court below relieves the unfair burden placed upon a local government by the judicial remedy of inverse condemnation.

SUMMARY OF ARGUMENTS

California cities today face the predicament of providing an extraordinarily wide range of municipal services while suffering a decrease in their tax revenues and fiscal resources. In their land-use planning and regulation, cities must reconcile conflicting demands arising from, on the one hand, the conservation and environmental mandates of state law, and on the other hand, their own distinctive local needs for commercial-industrial growth, a proportionate amount of housing, and the orderly, efficient delivery of services throughout incorporated areas. The importance of the California Supreme Court's decision in this case is its well-considered response to the threat which the inverse-condemnation remedy poses for California cities placed in this real predicament.

In rejecting the remedy of money damages for a land-use regulation exceeding the police power, the California court did not misconstrue, but rather correctly interpreted and applied, substantive law under the Fifth Amendment as developed in this Court.

Appellee Tiburon's ordinance preserves some residential use (up to one dwelling unit per acre) expressly and as a matter of right. In taking judicial notice of that remaining beneficial use, the California court properly ruled that Agins' complaint did not allege any taking of private property in violation of the Fifth Amendment. No constitutional issue is presented by a plaintiff-landowner who merely alleges that a land-use regulation has destroyed all use and value of the property, but who fails to apply for a beneficial use explicitly available under the provisions of the regulation. Moreover, multiple considerations of judicial administration warrant dismissal of such a complaint on a pre-trial motion attacking the pleading.

The owner of unimproved land holds no distinct investment-backed expectation that he may develop the land intensively under residential zoning in effect at the time of his purchase. Thus, the Agins acquired their property subject to an implied limitation that a change in zoning might affect potential development of the land, prior to the time they actually applied for and obtained approvals and then spent money on actual improvements. Tiburon's ordinance, therefore, did not defeat any investment-backed expectation reasonably fostered by Agins.

This case contains no element of physical invasion or actual public use of private property. The absence of this critical factor, upon which this Court has placed special emphasis in its most recent decisions under the Fifth Amendment, confirms that the California court correctly held that Tiburon's ordinance effected no taking. It is both unrealistic and illogical to contend, as do appellants here, that zoning requiring some open-space use serves to transfer to the public some right of physical access to, or enjoyment of, the property so regulated.

The police power under which land-use regulations are enacted is entirely distinct from the power of eminent domain. The police power procures a public benefit; but this benefit is inherently different from, in content and quality, the public purpose and use for which the power of eminent domain may be exercised.

Appellants would confuse that vital distinction through a studied exaggeration of some language found in this Court's prior decisions. But a fair reading of this Court's seminal decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), dispels any notion that the power of eminent domain is co-extensive with the police power, or that excessive regulation under the police power in and of itself requires a court not only to invalidate but also to award just compensation.

Invalidation is the appropriate remedy, as well as an extremely practical and substantial remedy, for a taking by excessive regulation. Appellants conjure up only imaginary abuses of that remedy. In reality, invalidation enables local government to reconcile the respective rights of landowners and the public at large (including landowners in their other role of citizen-taxpayers). At the same time invalidation leaves to legislative control the

articulation of comprehensive land-use planning and regulatory schemes, as well as the management of its public treasury. Principles of federalism and comity support this Court's affirming the decision below; and the federal Constitution requires no other result.

ARGUMENTS

I. In Affirming the Trial Court's Dismissal of Agins' Complaint on a Pre-Trial Motion, the California Supreme Court Correctly Decided That the Landowner Should Not Receive a Trial on the Merits When He Comes into Court Alleging That the Regulation Has Totally Destroyed the Use and Marketability of His Property but Fails to Apply for Uses Expressly Granted Under the Challenged Ordinance.

A. INVERSE CONDEMNATION IS THE LAND DEVELOPER'S SWORD.

The intimidating force of inverse condemnation grows proportionately with the relative ease with which a landowner may plead himself into court and then carry himself to trial against City. As a further tribulation, City must endure the uncertainty that the court's decision might affect other land-use decisions to be made in the meanwhile.

Appellants' argument that the question of a taking always remains a "question of fact" to be resolved at trial is but to introduce City's predicament. But when one adds that the plaintiff-landowner may be excused from applying for the uses explicitly available on the face of the challenged ordinance, and when one concludes that monetary damages must always remain available as a remedy if the court finds a taking, then one has artfully fashioned a weapon sufficiently powerful to force even the most dedicated legislator to hesitate from carrying out the land-use policy his constituents may have approved.

Admittedly, the purpose of the Fifth Amendment is protective, to defend private property. This is a good reason

why this Court should not permit it to become part of an offensive strategy devised by the would-be developer to force local government either to approve his project or to pay for the full potential value of that project through inverse condemnation.

B. A LAND-USE CONTROVERSY IS NOT RIPE FOR ADJUDICATION UNTIL THE LANDOWNER EXHAUSTS THOSE POTENTIAL USES GRANTED AND PROCEDURES AVAILABLE UNDER THE REGULATION.

Both the state and federal courts have traditionally exercised a necessary degree of discretion in determining when an alleged controversy is ripe for adjudication. In this regard the courts have refused to exercise their jurisdiction where the plaintiff has not exhausted his administrative remedies. *McLarty v. Borough of Ramsey,* 270 F.2d 232, 234 (3rd Cir. 1959); *United States v. Superior Court,* 19 Cal.2d 189, 194, 120 P.2d 26 (1941). The requirement of exhaustion of administrative remedies is particularly important where the constitutionality of legislative action is challenged. To require less of appellants herein "would be directly contrary to the policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty." *Rescue Army v. Municipal Court,* 331 U.S. 549, 576 (1947). This is equally true of suits questioning the constitutionality of zoning ordinances. *Brawner Building, Inc. v. Shehyn,* 442 F.2d 847, 854 (D.C. Cir. 1971).

This Court's opinion in *Moore v. City of East Cleveland,* 431 U.S. 494, 497 n.5 (1977), approved that rule, even though not applying it there to a party who suffered criminal prosecution under an ordinance which did require exhaustion. In civil cases, by inference, the plaintiff must first exhaust remedies, for the reasons more fully elaborated on by the Chief Justice in his dissenting opinion. *Id.* at 522.

Those reasons embrace not only considerations of federal judicial administration, but also the desirability of having local government place a practical meaning upon the language and purpose of the challenged regulation prior to any adjudication of potential constitutional issues. If local government's action serves to eliminate any such constitutional questions, then resort to the federal courts may become unnecessary. In addition, there are considerations of federalism and comity, not to mention the dictates of common sense. As the Chief Justice noted in his opinion in *Moore v. City of East Cleveland*:

> [I]t is common sense to permit the simple, speedy, and inexpensive processes of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts. Exhaustion avoids interruption of the administrative process and allows application of an agency's specialized experience and the broad discretion granted to local entities, such as zoning boards. Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem.

Id. at 524-25.

These principles possess increased vitality when applied to this case. Consider the evidentiary problems inherent in demonstrating that Agins' five undeveloped acres possess no feasible use under Tiburon's ordinance. That ordinance, of course, confers a residential use as a matter of right. Ordinance 123 N.S. § 2, Appendix D to Jurisdictional Statement Appendix (hereafter "JSA"), pp. 31-32. The ordinance also seeks to protect and preserve open-space characteristics of the land. Ordinance 123 N.S. § 2, JSA, p. 30. Were the landowners permitted a trial in the California courts, they would predictably argue that other requirements

in the ordinance — especially those concerning the slope and grading of hillside land, the preservation of natural features, drainage and soil stability—would make it completely impractical to develop the land for the permitted residential use, if only because of prohibitive construction costs. To prove such a case, the landowner would expectedly introduce expert testimony. Those experts might include architects, soils engineers, contractors from several specialty trades, landscape designers, local planning officials, and real-estate marketing and financing consultants. The court then would have the doubtful privilege of evaluating tract maps and engineering studies of terrain unfamiliar to it except as land to be parceled up. In addition, the landowner would predictably argue that Tiburon would never permit the "reasonable use of open space land" sought under Ordinance 123 N.S. *Id.* Here the court would be called upon to exercise its own creativity in devising potential uses, theoretically permissible but perhaps never formulated by the parties, which might rescue or sink the ordinance depending upon their reasonableness.

Is it sensible to choose, as an alternative to such a lengthy trial on the question of taking, a rule requiring the landowner first to make an application to the city under the challenged ordinance and thereby to learn how, in fact, the city will apply its ordinance to this land? The California Supreme Court in this case made such a sensible choice. It is the choice which this Court should approve and adopt for those additional reasons germane to federal judicial policy.

C. AGINS' COMPLAINT FAILED TO ALLEGE ANY DEPRIVATION OF A PROPERTY RIGHT PROTECTED BY THE FEDERAL CONSTITUTION.

The California courts decided that Agins had not stated a cause of action for inverse condemnation and, after Agins declined to amend a second cause of action for declaratory

relief, that Agins had not stated any claim that Tiburon's ordinance violated the Constitution. That decision is consistent with recent decisions of this Court on the substantive law of takings under the Fifth Amendment. To use the key phrase from this Court's decision in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978), the complaint alleged no interference by Tiburon with any "distinct investment backed expectations" in residential development of the land.

It is not sufficient for appellants to argue that they purchased the land under residential zoning and that Tiburon's open-space studies and/or ordinances destroyed any feasible residential use of the property. This Court rejected, in *Penn Central,* any characterization of an unrealized development scheme as a protected property right:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Id. at 130-31.

In *Penn Central,* of course, this Court addressed the landowner's right to develop the air space above the existing railroad terminal. But the same logic which defeats any artificial isolation of air-space rights also defeats any isolation of a potential high-density residential use, for example, from other potential uses and actual benefits of ownership

held by the owner of undeveloped land. Why should the landowner be permitted to prove a taking of but one selected potential use, absent any investment in support of that use? Surely high profitability influences the landowner's selection. But hoped-for profit is too airy a substance out of which to fashion a vested property right. Indeed, the police power may even prohibit an existing, most beneficial use without effecting a taking, precisely because the value of the land as a whole may not have been greatly diminished. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

This, appellants would argue, is too harsh a rule. But any contrary rule would effectively limit the power of local government to control the development of unimproved land, once the land is acquired by an investor hoping to undertake the most intensive permitted development or, at least, to realize (at the expense of local government) the full value of the land as so developed. Indeed, government could not control the *timing* of development, simply because every would-be developer will have perfected his right in the year of his investment, no matter when he applies and no matter how much the world has changed.

A speculation on unimproved land is not a distinct investment-backed expectation in a realized development project. The landowner may have built his castle, but he has not brought it down to earth. His reasonable expectation might be that he may enjoy the land, in its natural condition, as a private recreational facility. Or it may be the expectation that, after paying its carrying costs, he may ultimately resell the land at a profit or, alternatively, establish some economic use of the land, subject to then-prevailing commercial and financial conditions and governmental regulations. The courts need not define such reasonable expectations in the abstract. The only question here is whether the

challenged regulation has interfered so drastically with the landowner's use of his property as a whole as to raise an issue of taking under the Fifth Amendment.

Tiburon's ordinance did *none* of the following:

1. Prohibit any existing land-use;
2. Restrict only Agins' land, in isolation from others in the city;
3. Advance an impermissible public purpose;
4. Authorize physical entry and use of the land by the public.

This last (missing) feature deserves special attention. As this Court stated in *Penn Central*:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by Government. . . [citations omitted]. . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124.

Notwithstanding the theoretical possibility that, under some compelling set of facts, a taking might arise from a regulation which interferes too extensively with "distinct investment backed expectations," this Court in its prior decisions has shown proper reluctance to hold such a possibility to be an actuality in the case before it—in the absence, at least, of any physical invasion of private property. This Court's *practical* emphasis on the physical confiscatory result of the regulation most accurately defines the present law on takings.

Accordingly, this Court did find a taking in *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S.Ct. 383 (1979), precisely because the landowner had spent money in transforming a once land-locked lagoon into a waterway subject to a public navigational easement held by the federal gov-

ernment. The opinion in *Kaiser Aetna* specifically noted that the landowner had consulted the government before improving the lagoon. Although giving notice to the government did not create any estoppel against assertion of the navigational easement, the landowner had effectively perfected its reasonable expectation that its investment in improvements would produce a private benefit, instead of a free waterway for the public.

It is true, as appellants here point out, that *Kaiser Aetna* concerned the effect of a federal regulation. However, as this Court expressly stated in the last paragraph of its opinion, the taking would result not from the governmental regulation considered alone, but rather from the public's physical invasion and use of the lagoon under a right created by the regulation. *Id.* at ....., 100 S.Ct. at 393.

There is no inconsistency between these decisions and that of the California Supreme Court in this case. Agins' complaint, in attacking an ordinance expressly conferring some residential use as a matter of right, stated no claim of a constitutional violation under any variant of the law of takings recognized in this Court or the California courts. Appellants protest that dismissal of the complaint on a general demurrer is a harsh procedure. However, permitting clearly unmeritorious cases to proceed to trial has its painful consequences for appellee Tiburon, the judiciary, and ultimately the public at large.

II. In Merely Rejecting the Remedy of Monetary Damages for Regulatory Takings, the California Supreme Court Did Not Misinterpret Substantive Law Under the Federal Constitution.

A. THE CALIFORNIA COURT COULD CONTROL THE IMPLIED REMEDY OF INVERSE CONDEMNATION DAMAGES WITHOUT OFFENDING THE CONSTITUTION.

In affirming the dismissal of Agins' first cause of action for inverse condemnation, the California Supreme Court ruled that a monetary remedy, in the form of a forced pur-

chase of the land by government, will not be available in the California courts for an alleged taking through overly restrictive land-use regulation. This Court need not give that decision any broader meaning. The California court concerned itself with remedy, but did not disturb the substantive law of takings.

Nothing in the Fifth Amendment requires that money remain an always-available remedy for a taking not involving an actual physical invasion of private property. Moreover, nothing in the Fourteenth Amendment precludes a state court from controlling judicially-implied remedies under the Fifth Amendment and analogous provisions of the state's own constitution. *Cf. Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.,* 284 U.S. 151, 158-59 (1931) (freedom of state legislature to substitute one remedy for another, without offending the Fourteenth Amendment, provided that the substituted remedy is substantial and efficient).

Even appellants' own fundamental theory—that a land-use regulation somehow converts a private property right into public ownership—leads to the conclusion that state law may limit the availability of monetary compensation. The definition of real property interests has traditionally remained the province of state law, statutory and judicial. *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63 (1966) (state law, not federal, governed rights of parties under oil and gas lease originally granted by United States under its statute). Thus the California court could properly exclude the "benefit" of an open-space zoning ordinance from the class of real property interests recognized under California law; and by doing so, that court might have prevented the operation of the takings clause in the area of such regulation. But the California court has not gone so far. It has not chosen to define or redefine concepts of

private property in the context of land-use regulation, but rather it has chosen to control the remedies available for a violation of the traditional, substantive law on takings.

B. ONLY BY CONFUSING THE POLICE POWER WITH THE POWER OF EMINENT DOMAIN CAN APPELLANTS HOPE TO PRESERVE MONETARY DAMAGES AS A CONSTITUTIONALLY REQUIRED REMEDY.

Appellants deliberately confuse the power of eminent domain with the police power under which land-use regulations are enacted, in order to derive the hybrid concept of regulation with compensation. In their view, if a regulation "goes too far" by effectively destroying all economic use and value of the land, then government must pay just compensation, even though government intended only to exercise its police power and not to appropriate the land for public use in the literal, physical sense.

The crux of appellants' argument is their presumption of confiscatory intent. But that presumption has no predicate. It cannot rest upon the ultimate fact that the landowner may possibly prove his total loss of market value. How can one logically equate the landowner's private economic loss with any equivalent public acquisition—especially where that acquisition does not appear in the form of an actual physical use of the property? Government may legitimately regulate private property, for example, in order to encourage a voluntary reallocation of scarce resources amongst private parties; and the resulting benefit to the public does not in itself suffice to establish a taking. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-66 (1958) (restriction on operation of gold mines during wartime designed to reallocate scarce machinery and labor).

It is true, of course, that, in enacting a regulation, government must have reasonably sought some public 'benefit' within the reach of its police power. Often the benefit

derives from the elimination of some noxious use or "nuisance"; and in such cases the reach of the police power is conceded to be extensive. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, ... (1978), and cases cited therein. But a benefit to the general welfare procured by regulation does not possess the same content and quality as those necessary public uses, inherently physical in character, for which the power of eminent domain may be exercised. For example, zoning regulations designed to assure a desirable residential environment, or to deter the congregation of transients and socially disfavored persons in a "skid-row" district, procure a moral benefit for the community which is not susceptible to translation into any public use of the property restricted. *Young v. American Mini-Theaters,* 427 U.S. 50 (1976); *See, generally, Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

Under this analysis, appellants' effort to fold the police power back into the power of eminent domain fails utterly. Government power is simply government power, appellants would argue. But that is simply to withdraw from the arduous intellectual effort of drawing critical distinctions.

The search for the elusive line of demarcation between a valid exercise of the police power and an invalid exercise tantamount to a compensable taking has consumed the energies of scholars and jurists ever since Justice Holmes, in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), apparently placed the police power within the same continuum in which the power of eminent domain lies. It is perhaps too late now to add anything novel to this commentary, unless one takes that opinion as a point of departure for a venture into innovative structuring of legal and economic land-use policies. It is enough to point out here that, like any strong stimulant, Justice Holmes' opinion has excited remarkable creativity in the area of

land-use theory, even though the stimulation itself results from the juxtaposition of disparate government powers which otherwise might have been considered remote.

The time has arrived to see that juxtaposition for what it is, in the context of the facts of *Pennsylvania Coal,* and so to reject any theoretical or practical continuity between the police power and the power of eminent domain. The statute challenged in that case prevented the coal company from mining coal beneath the surface of land which the company had conveyed by deed with an express reservation of subsurface mineral rights. In their suit to enjoin the coal company's mining, the plaintiff-landowners (grantees under the deeds) relied upon the statute as defeating the coal company's rights. The Pennsylvania Supreme Court conceded that the company had contractual and property rights protectable under the federal Constitution. However, the Pennsylvania court held that the statute, as a legitimate exercise of the police power for the purpose of protecting the public from the danger of subsidence, could effectively bar the exercise of those rights.

This Court reversed, thereby dissolving the state court's injunction. *Id.* at 416. The significance of the decision is defined by these fundamental aspects of the case:

> A. The coal company held vested property rights in the subsurface coal. Those rights were owned prior to, and were reserved under, the conveyances by deed to the plaintiffs. The company reasonably expected that its investment in the coal could be profitably realized at some future date without interference from the grantees—or from the state in aid of the grantees.
>
> B. The state effectively appropriated the company's coal for public use by requiring that the coal remain physically in place as a subterranean support for plaintiffs' lands. In essence, the coal company lost a valuable commodity, while the public acquired its use as a pillar supporting the surface. Moreover, the loss was total.
>
> C. This Court awarded no monetary damages to the coal company, but simply relieved it from a judicial restraint based upon a statute of questionable validity.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

What Justice Holmes said in this context has, of course, acquired a significance virtually independent from the actual decision of the Court. Most frequently cited is his verbal parallel between the regulatory and the eminent domain power: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" *Id.* at 415.

But the ease of Holmes' expression masks an enormous conceptual difficulty involved in conjoining the two powers. Is it not the legislature which should "recognize" its "taking", after judicial invalidation, and then correct its excessive regulation?

A basis for answering affirmatively is presented by Justice Holmes' more expansive and balanced reasoning earlier in the opinion:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there

> must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413. The first part of this statement no longer provokes controversy. As this Court observed in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 131 (1978), the magnitude of the diminution in value does enter into the question of the regulation's validity; and this Court has not invalidated regulations resulting in as much as an 87.5% loss of property value. *See Hadacheck v. Sebastian,* 239 U.S. 394 (1915).

Hence the "implied limitation" on private-property values created by the very existence of a sovereign and democratic government is, in economic terms, very great in scope. In terms of content and application, legitimate regulation under the police power also possesses a scope which "expands" or "contracts" according to changing conditions—according to the course of urban development, the evolution of social and cultural values, environmental conditions, economic forces, and a myriad of other local, tangible pressures. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387 (1926). Accordingly, the "magnitude" of land-use regulation which may violate the landowner's right to due process of law does not declare itself in any mathematical formula and, even if it did, would not necessarily result in a violation in every historical period and in every urban context.

Properly analyzed, Justice Holmes' formulation tells us only that, when that critical "magnitude" is reached, the police power will no longer "sustain" the legislative "act." A court, therefore, must invalidate the legislative act. If then the legislature chooses to proceed, the legislature must

decide for itself whether it will exercise its distinct governmental power of eminent domain, and thereby "sustain" its original act. Nothing in Justice Holmes' opinion indicates that a court must, or should, direct the exercise of such legislative discretion following judicial invalidation.

Even more foreign to the opinion is any suggestion that a court must, under constitutional mandate, order local government to pay compensation to the landowner as the *immediate consequence* of judicial invalidation. Were that the meaning of *Pennsylvania Coal,* eminent domain would become a power shared by the judiciary.

The due process clause of the Fifth Amendment should not be read so as to subsume, and thereby empty of all independent significance, the succeeding clause requiring government to pay "just compensation" when it takes property. The latter clause concerns itself with intentional, physical seizure of private property for public use—a different subject and a different governmental power, warranting separate constitutional expression. It forbids the sovereign from expropriating property without payment. This interpretation of the Fifth Amendment finds support not only in historical antecedents exemplifying abuses of sovereign (monarchic) power, but also in judicial deference to a coordinate branch of representative government—to a legislative branch which expresses the public will, through open, deliberate, and well-measured proceedings.

C. INVERSE CONDEMNATION REMAINS AVAILABLE IN THE CALIFORNIA COURTS FOR PHYSICAL TAKINGS OF OR INJURY TO PRIVATE PROPERTY.

The California Supreme Court has maintained the distinction between the power of eminent domain and the police power. Its decision in this case presents only part of that distinction. Another recent decision offers the other part.

In *Jones v. People ex rel. Department of Transportation,* 22 Cal.3d 144, 583 P.2d 165, 148 Cal.Rptr. 640 (1978), the California Supreme Court preserved the remedy of inverse condemnation for a landowner who had lost a right of physical access to his property as a result of changes and delays in the state's planning for a freeway route. The state and local agencies agreed to close off adjacent public roadways. Ultimately, the landowner lost any opportunity to develop the land for intensive residential use, for lack of direct access to roadways capable of carrying traffic from the proposed subdivision. The California court afforded the landowner an inverse condemnation remedy, notwithstanding the legitimacy of the state's (and local government's) activities considered in isolation.

In this respect, the California Supreme Court's recent decisions remain perfectly consistent with those of this Court. *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S.Ct. 383 (1979); *Andrus v. Allard,* ..... U.S. ....., 100 S. Ct. 318 (1979). As argued above, *Kaiser Aetna* stresses, in finding a taking, the actual physical invasion of the lagoon by the public resulting from the government's enforcing a navigational easement created by regulation. In contrast, *Andrus* found no compensable taking, even though the regulations there prohibited any commercial resale of the Indian artifacts in question, on the ground that the owners had not lost physical possession. This Court stressed that, though the right of resale might indeed be substantial, the owners retained most of the other rights comprehended in ownership of property. *Id.* at 327. Although *Andrus* concerned personal property, the decision is based upon *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and its reasoning.

D. ZONING COMBINING OPEN-SPACE WITH RESIDENTIAL USE DOES NOT EFFECT ANY PHYSICAL INVASION OF PRIVATE PROPERTY.

One might fairly interpret *Penn Central* as rejecting implicitly any contention that a violation of the Constitution occurs by virtue of a land-use regulation which preserves, for the enjoyment of the public, open views through the airspace above designated historical landmark property. This interpretation defeats another misconception of appellants here. It is misleading to suggest that, because the public may enjoy an unimpeded view of the natural landscape or of an historical monument or of any aesthetically pleasing natural or man-made object, government has physically taken private property. Yet, in the experience of City, that is an all too familiar attack upon open-space regulations adopted pursuant to California statute. The case now before this Court offers another specious example.

Appellants argue that they have lost a "right of user" as a result of Tiburon's ordinance, insofar as it requires open-space use. They imply, but do not dare to argue expressly, that the public has acquired an equivalent right to use the property; that is, to enter onto it and physically enjoy it. No such thing has happened or will happen. Tiburon's ordinance does not contemplate any required dedication of public trailways through the property in connection with its development. Rather, the ordinance preserves the utmost flexibility in choosing methods of assuring open-space use in conjunction with the permitted residential use. Ordinance 123 N.S. § 2 JSA, pp. 30-31. The ordinance does not equate "open" with "empty" or "vacant" or "bare," though Agins would imply otherwise. In truth, the ordinance contemplates a landscape filled with natural growth, geological formations, artful landscaping and, most importantly, some residential (and accessory) uses. Open-space zoning does not mean scorching the earth.

Unless one is sufficiently romantic to believe that to see is to use and possess, one cannot equate an open-space regulation with a public use. *Friedman v. City of Fairfax,* 81 Cal.App.3d 667, 677, 146 Cal.Rptr. 687 (1978). The authorities cited by appellants concerning the so-called "right of user" concern mainly physical invasion and property damage affording recovery on a theory of inverse condemnation. *See* Appellants' Brief, pp. 22-23.

One California appellate court has offered a trenchant response to such attacks on open-space regulation. In *Viso v. State of California,* 92 Cal.App.3d 15, 154 Cal.Rptr. 580 (1979), the local agency rezoned the landowner's property as "general forest." In denying relief through inverse condemnation, the appellate court observed that, under the regulation, the landowner still had the right to make use of the property as, for example, a private campground. *Id.* at 24. In short, he could charge members of the public a fee for admission. No matter how great the benefit received by the public in the form of its enjoying tall trees, fresh air, and deep-forested mountainsides, the landowner had not lost his right to control access to and use of his property. To invoke the time-honored symbol mentioned in this Court's opinion in *Andrus v. Allard,* most of the sticks in the landowner's bundle of rights remain in his own hands.

III. The California Supreme Court's Decision Leaves Invalidation As the Appropriate and Substantial Remedy for an Invalid Regulation.

The California Supreme Court confirmed that it will not tolerate violations of the California and United States Constitutions in the form of uncompensated takings of private property. But that court also decided that eliminating the source of the violation, through invalidation of the challenged regulation, is the appropriate remedy available to the landowner in California courts.

Appellants portray invalidation as a sham remedy. Disregarding the fact that the California courts have effectively applied that remedy *e.g., Kissinger v. City of Los Angeles,* 161 Cal.App.2d 454, 327 P.2d 10 (1958), appellants have no difficulty in predicting that local legislatures will find devilish ways to abuse the remedy, while the courts will be conscripted into service as boards of zoning appeals. This Court should not overrule the California court on the basis of such unverifiable, dire predictions.

It is difficult to understand why appellants fear that local legislatures will, after judicial invalidation, simply re-enact an ordinance in slightly different form, but with essentially the same confiscatory effect. No one gladly risks affronting a court, especially not a local legislator receiving the advice of his public attorney. Given the sheer volume of proposed legislation before them, local legislators likewise would not gladly waste their time re-enacting an ordinance certain to be invalidated once again in court.

At bottom, appellants are really suggesting that, having once passed an invalid ordinance, the local legislature will do it again and again, out of innate perversity. The short response to that suggestion is that the legislature is not a council of diabolical powers, but rather the representative body of the people within a democratic government. Landowners also vote in local elections. Their political remedy is one well known to them.

The remedy of invalidation is preferable to a monetary remedy which, in effect, forces local government either to permit the particular development project most desired by the landowner or to purchase land at a price based upon its full potential value through development. In reality, the monetary remedy is the ultimate weapon in

the landowner's arsenal. It is he who applies to the local agency for development; it is he who elicits responses, all too often easily misinterpreted later in court, from local planning officials. It is he who shapes the factual record on which a court later determines a compensable taking has occurred. If government has the means for oppression within its police power, the landowner has the ability to lay ambush through his strategic solicitation of governmental action.

City now will take the liberty of offering its own prediction on the effect of leaving invalidation as the chief remedy for regulatory takings:

1. The volume of land-use litigation in the California courts will be reduced. (The impact on the federal courts will depend upon the decision on this appeal.)

2. Only the meritorious cases will be litigated. Those intended mainly to intimidate local government will become fewer.

3. The courts will have a far more satisfactory factual record on which to proceed, because most cases will arise after the regulation is applied by the local agency. A landowner who can profit only by completing some project has a great incentive to apply first to the local agency.

4. Because declaratory relief and mandate proceedings receive expedited treatment, the landowner will experience less delay and smaller interim expense during the entire period from administrative application to judicial resolution.

5. Compromise, flexibility, and creativity will emerge at both the administrative and judicial levels.

Perhaps the most meaningful example of California's invalidation remedy appears in *Furey v. City of Sacramento,* 24 Cal.3d 864, 598 P.2d 844, 157 Cal.Rptr. 684 (1979), a case in which this Court has already denied the landowner's appeal, *sub nomine Webber v. City of Sacramento,* .... U.S. ...., 100 S. Ct. 476 (1979). In *Furey* the California Supreme Court sustained dismissal of a cause of action for inverse condemnation, challenging an open-space rezoning, based upon its earlier decision in *Agins.* But *Furey* contained a second issue: the landowner's payment of special assessments to a sanitary district for a sewage-treatment system which would prove useless to his land if it remained agricultural.

In granting equitable relief, the California Supreme Court indicated that the special assessments on the land might be reduced and refunded so as to return, in monetary form, the burden of assessments for which the landowner had not received any corresponding benefit. The court noted that the landowner had paid almost one-third of all the assessments levied by the district. In effect, he had financed a public facility enjoyed only by others in the district. Alternatively, the court suggested invalidation of local government's open-space zoning as applied to the property, on the ground that the zoning would preclude the landowner from availing himself of the benefits for which he had paid. Above all, the California Supreme Court, without controlling precisely the exercise of local legislative powers, strove to achieve fair and equitable treatment for the landowner. Flexibility and practicality are the hallmarks of the decision in *Furey.*

V. The Distribution of Burdens Imposed by Land-Use Regulations Need Not Take the Form of Cash Payments Out of the Public Treasury to Individual Landowners.

Regulation under the police power of local government should serve to procure some benefit for the public at large. Yet the public, however much its income and property may be taxed, pays no money for each such benefit received from a local regulation. The very idea of taxing a citizen for clean air and open vistas seems ridiculous. And no less ridiculous, appellants might object, would be the idea of taxing a residential developer for the benefit of permitting commercial uses (for instance, a grocery store) near his project.

Yet appellants seriously argue that the corresponding burdens of land-use regulations, when they fall too heavily upon a single landowner, should be redistributed among the public at large by disbursing money from the public treasury and paying it to the landowner. This argument mistakes the very medium in which the benefits and burdens of land-use regulations flow amongst the citizens. One suffers a restriction on one's property because, under the comprehensive scheme of regulation other properties suffer other restrictions conferring different benefits upon other landowners. We are in the realm of social values, where money is not the medium of exchange.

The scheme may admittedly be imperfect. But the courts properly leave its adjustment and correction to the local legislature. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

The benefits conferred by land-use regulation are not "luxuries", as appellants call them. It is simplistic to argue that government should be forced to pay for the benefits obtained through its land-use regulations, or else abandon such regulation altogether. Government is not an ordinary

consumer who may, in hard times, have to forego four ounces of butter in order to buy a few slices of bread. Conserving natural resources, decreasing urban congestion and pollution, rationally locating and diversifying land uses —such needs are not commodities to be classified as luxury items. Rather, they compose the public health, safety, and welfare to which land-use regulation addresses itself.

The citizens of California have not yet told its Legislature that they no longer desire to preserve the State's land resources and assure a healthful environment. Until they deliver that message through political processes to the Legislature, or until the Legislature discovers a better way to promote those objectives than through local regulation, the cities of California cannot simply decide to regulate land uses no more and to let private enterprise and natural forces do what they may to the environment and to each other. Indeed, that *laissez-faire* approach in prior decades may have contributed to the environmental and conservation problems we now experience.

Perhaps we all are "over-regulated." But to rail against regulations simply because there may be too many of them, or because they make private enterprise more costly, is not to offer an enlightened analysis or a practical alternative.

Nor is it true, as appellants argue, that invalidation will pull apart the entire fabric of land-use regulation, thereby crippling local government. The courts know how to limit the scope of their orders; and local legislatures know how to correct defects in their ordinances. Thus the conclusion which appellants would reach—that the availability of money damages affords greater flexibility to local government—does not follow. Government can always decide, voluntarily, to purchase private property. The question here is whether the courts should force such a purchase, instead

of simply invalidating. The answer is that the legislature should control the expenditure of public funds. There remains a qualitative difference between executing a graceful dive into the pool or simply being toppled.

Both as a matter of comity and practicality, the federal courts should not interfere with local autonomy over land-use regulation. The very diversity of this nation's topography and climate virtually precludes any other system of land-use control.

One wonders what the future of private property in this nation will be if government must pay money for every intangible benefit procured for the public at large through land-use regulation. Upon analysis, one may reach some absurd conclusions. If forced to purchase all property, and every right of use of property, from which the public generally receives a benefit, local government would systematically erode its own real property tax base. Thus, even if government had enough money to begin such a program of acquisition, it would soon consume its own fiscal resources. Indeed, one could predict an even more radical result: In the face of the astronomically high cost of purchasing all such public benefits, government might rationally choose instead simply to eliminate by *fiat* all private land-holdings within its jurisdiction. The term commonly used is "to nationalize". That, indeed, would create a question of constitutional dimensions; and the question in turn might be answered in a further amendment to the Fifth Amendment.

CONCLUSION

The decision of the California Supreme Court is consistent with substantive law under the Fifth Amendment. Nothing in that law requires the remedy of inverse condemnation for excessive land-use regulation. Indeed, the judicial remedy of invalidation affords the most fair, efficient, and substantial means of adjusting the rights of government and those of landowners within the context of the modern urban environment. It should not be forgotten that landowners, whether or not they are litigants, also belong to the class of citizen-taxpayers.

For all of the foregoing reasons, *amicus curiae* City respectfully urges this Court to affirm the decision below.

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APPENDIX "B"

Although Rule 42 permits submission of 'his *amicus* brief of City of San Jose by its authorized law officer, City Attorney Robert J. Logan, without the written consents of the parties, *amicus* City has solicited and obtained consents from the parties nonetheless, so as to assure compliance and advise the parties of City's interest. Those consents are included in Appendix B to this brief.

[Letterhead]

February 12, 1980

Robert J. Logan, Esq.
City Attorney
City of San Jose
151 West Mission Street
San Jose, CA 95110

Re: Agins v. City of Tiburon
United States Supreme Court—No. 79-602

Dear Mr. Logan:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellants in that case, I hereby give such consent.

Very truly yours,

JOHN P. POLLOCK
for Pollock, Williams & Berwanger

JPP:jb

cc: Gideon Kanner, Esq.
Reginald Hearn, Esq.
Robert I. Conn, Esq.

City Attorney
City of San Jose
Rec. Feb. 19, 1980
From.....to.....
.....
.....

[Letterhead]

February 11, 1980

Robert J. Logan, Esq.
City Attorney
City of San Jose
151 West Mission Street
San Jose, CA 95110

Re: Agins v. City of Tiburon
United States Supreme Court # 79-602

Dear Mr. Logan:

In response to your request for consent to file a brief *amicus curiae* in the above, please be advised that I hereby consent on behalf of the Appellee, City of Tiburon.

Very truly yours,

ROBERT I. CONN
Town Attorney

RIC:sb
cc: Mr. John Pollock